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A TRADE-MARK IN A FAMILY NAME.

Trade-mark rights consist in the owner of a trade-mark marking his goods in an exclusive way to the trade. But if his trade-mark is originally descriptive of quality of the goods, or geographical or comes from a family name, it is not a trade-mark by adoption, but becomes such by being applied exclusively to goods so that any other using the mark on his goods interferes with, or palms off the latter as the goods of, the owner of the acquired trade-mark. This seems to be the consensus of authority on this subject.

But the acquired trade-mark seems to have been regarded as advancing to its status as a trade-mark with a limitation not attachable to an adopted trade-mark. It labors always under the difficulty, that it may never acquire the full status of an adopted trade-mark. It can never claim that it has taken away all right from others to describe their goods as having the quality expressed in a descriptive term, or that the goods originate from a certain locality, or that the family name embodied in a trade-mark may not be used by another of the same name. It does seem, however, that second or subsequent users of a descriptive, or geographical mark or of a family name are greatly limited in their rights and that they can never build up such designation into a trade-mark or trade-name that is absolute or unqualified.

We are moved now to speak thus in view of a recent decision by Eighth Circuit Court of Appeals, where a family name took on trade-mark rights in connection with the manufacture of a piano. Stix, Baer & Fuller D. G. Co. v. American Piano Co., 211 Fed. 271.

The facts show that Wm. Knabe began the manufacture of a piano in 1837, which became famous as the "Knabe." In course of time this trade-mark became vested in the American Piano Company. The grandsons of Wm. Knabe organized a corporation in 1911 for the manufacture and sale of pianos, and the American Piano Company sought an injunction to restrain them from using the name "Knabe" either singly or in combination upon pianos, in advertisements or otherwise in the piano business. The Knabes were first connected with the successors of Wm. Knabe and retired to form this corporation.

The district court enjoined a department store having a contract with the corporation formed by the grandsons "from making any oral representation or using or permitting to be used in connection with the sale of pianos, in any catalogue, placard, circular, advertisement, or otherwise, descriptive of pianos manufactured by (this corporation) any statement or representation calculated to induce the public to believe" that these pianos were Knabe pianos.

This injunction was objected to as being too broad and the Circuit Court of Appeals modified it by allowing defendant to advertise their piano as the "Knabe Bros." piano and to distinguish it from the "Knabe" piano in a "notice" to be embodied in their circulars, catalogues and advertisements.

A case in Northern District of Ohio required that the corporation in which the dry goods company dealt should place on the fall boards of its pianos the following language: "The Knabe Bros. Company. This piano is not the original 'Knabe,' but is made under the supervision of E. J. and Wm. Knabe, III., grandsons of the original Wm. Knabe, I."

This case attempts to apply the decision in the Hall Safe cases reported in 208 U. S. 267 and ibid 554, where it was ruled there was nothing to prevent other Halls from using their name in trade as to the same class of articles, provided they explain that their article is not that of the

original manufacturer. They may explain that they are "sons of the first Hall and brought up in their business by him and otherwise may state the facts."

All of this is right, but, if it arises out of the fact that the grandsons are using a similar trade-mark because it is their surname, it seems all wrong. By the use of the tradename they do what is calculated to confuse the products of the original manufacturer with theirs.

For example, the Ohio court required the corporation to state that "this piano is not an original Knabe," but Circuit Court of Appeals says this is error, because the word *original* tends "to characterize the defendant's product as inferior to that of complainant and is unduly prejudicial to it." But why should this be taken into account, if the acquired signification needed to be distinguished in this way, and an infringer of the same name merely has the right to do business in his own name, but not call his products after his name? We interpret the Hall Safe cases as meaning that there is nothing to be claimed against the younger Halls carrying on business in their own names and they merely have the privilege of putting out their products thoroughly distinguished from those of the older concern. Whatever trouble they may have in doing this is nothing to the older Halls. They must thoroughly and readily distinguish their own products, and in doing this if they attempt to use their name, as a tradename for their products, they should submit to some such implication against their own products as the use of the word "original" may convey.

For example in this case "Knabe" was a name involving the presence of distinctive qualities in a piano. When other manufacturers of the name of Knabe put out a piano they might send a tradename along with it in no way resembling Knabe and then no explanation would be needed. Those of the same family name have no more right to attach a confusing mark to a new product than those of a different family might.

The decision speaks of a "duplicity" in the name "Knabe" pianos, but it seems to us that the duplicity arises out of the fact that the court confuses the doing of business of the later Knabes with the naming of their products. If the original Knabe had called his piano some other name than "Knabe" or it had acquired some other name, that other name certainly could not be infringed upon by the later Knabes, though it may have been a geographical or descriptive name.

When the court speaks of its being "a grievous perversion of the law of unfair trade to use its doctrines so as to convert a tradename into a patent right," we see little application for such a statement. We remember in the Singer case Justice White said something of this kind where a trade-mark was claimed in the name of a patented article after the patent had expired, but that is a different thing from claiming legitimate operation for a trade-mark right.

NOTES OF IMPORTANT DECISIONS.

LIBEL AND SLANDER—PRIVILEGE EXTENDED ACCORDING TO CUSTOM IN COURSE OF BUSINESS.—The Supreme Court of Wisconsin holds that an instruction to the jury that, where a slanderous statement was made by one to another in regard to business negotiations in the presence of the latter's wife and son, the jury might consider whether this was made in the usual course of business. Cook v. Gust, 145 N. W. 225.

The court said: "It is probably a very general custom for farmers to consult their wives and members of their family when they are about to engage in a new business enterprise of some importance. Where this practice is pursued, such communication as here made is privileged to the other members of the family as well as the husband, assuming that it is made in good faith and not from malicious motives."

The point is very technical that the slander was privileged only so far as the husband

was concerned, and it would seem to be well within the rule of privilege that mention is made only in presence of others of the household. It would be expected, that one would tell of the matter to members of his family, as the law will presume their intimate interest in all that concerns the family. The husband could mention the matter to members of his family and would be expected so to do.

COURTS—HEADNOTES AS THE DECISION OF A COURT.—In Burbank v. Ernst, 34 Sup. Ct. 299, it was held that the opinion of the court is to be looked to as to what is really decided, where the reasoning is not represented in the headnotes, though the latter are made by authority of the court, but the headnotes are given no special force by statute or rule of court, as in some states. The court said: "We look to the opinion for the original and authentic statement of the grounds of decision."

It is to be observed here that the court limits this rule to states where statute or rule of court does not provide otherwise. Should the opinion and the headnote disagree in these circumstances, we imagine that the opinion would be regarded purely as the personal view of a particular judge.

BAILMENT — CONTRIBUTORY NEGLIGENCE BY GRATUITOUS BAILEE IMPUTABLE TO BAILOR.—It seems something remarkable to hold that where one lends his property to another to use for his own purposes and the property is destroyed by a third person, by reason of the contributory negligence of the bailee, the bailor may recover for its loss. This, however, has been held by Kansas City, (Mo.) Court of Appeals in the case of Spellman v. Delano, 163 S. W. 300.

This ruling is made on the theory that there is no relation of principal and agent between bailor and bailee, as for example, where the bailment is to subserve some purpose of the bailor, and therefore there is nothing to make the fault of the bailee imputable to the bailor. But the question is begged in making this statement, because in a sense the bailee is the agent of the bailor to hold the property for him in a permissive use. It would seem that where a bailee holds property for his own use and not for mere safekeeping, he is bound to a stricter rule as to care than were he holding it for the bailor's benefit and that, if he were careless in the former case in exposing it to destruction, he might be liable to the bailor, when in the latter case he might be excused from liability.

Therefore, the bailor may the more expect that he will not violate his contract to be careful about its keeping. He depends upon that when he allows the bailee to take the property into his possession. It really, however, would seem to be of no interest to a third person what is the nature of the bailment. He must respect it in one case just as in the other and, if the bailee neglects to care for the property, he makes himself liable to the bailor. Agency, therefore, is a sort of fiction! The bailee is exercising control over the property by consent of the bailor and for negligence in this regard he takes his chances. It hardly seems right to speak of imputability or non-imputability, as the bailee has a special property which enables him to sue for the injury and account to his bailor for the recovery. The case cites considerable authority *pro* and *con* on the subject and, seemingly, the weight is against what it holds.

WHO ARE "WORKMEN" UNDER THE WORKMEN'S COMPENSATION LAWS.

For the purposes of this article, only the provisions of the English Workmen's Compensation act defining workmen, and the decisions rendered thereunder, will be considered. Some or all of these provisions have been incorporated in many of the statutes enacted in the United States, and their construction in this country will be the same as in England. In some of the statutes the term "employe" is used, while others use that of "workman." The two words are synonymous and are used interchangeably.

The English act provides: "'Workman' does not include any person employed otherwise than by way of manual labor whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an out worker, or a member of the employer's family dwelling in his house, but save as aforesaid, means any person who has entered into or works under a contract of

service or apprenticeship with an employer whether by way of manual labor, clerical work, or otherwise, and whether the contract is express or implied, is oral or in writing."

There Must Be a Contract of Service.—One is not a workman unless there exists between him and his employer a contract of service. In this regard there is a decided distinction between a contract of service and a contract for services. The latter includes not only the relation of master and servant, but other relations in which the employer has no control over the employe, who may be rendering services as an independent contractor. The former is a contract which creates the relation of master and servant. While it is a contract for services, it is something more, the distinguishing feature of which is the right of control the employer has over the way in which the services shall be rendered, not only generally, but in regard to details.[1]

A workman employed as steel tester was permitted the use of a cottage adjoining the works in which he was employed in consideration of his being "responsible for seeing" that certain work was done in the offices of the works, which work was usually performed by his daughters. The man came to his death one night while asleep in his bedroom, by asphyxiation from gas which leaked through into the cottage from a stove located in the basement of the offices adjoining the cottage. It was held that the accident did not arise out of and in the course of the employment, because at the time of the workman's death he was not engaged in his employment; that the agreement in question was merely one of tenacy embodying one for services and was not a contract of service.[2]

Employment of a Casual Nature and Not for the Purpose of the Employer's Trade or Business.—Regarding the provision relating to casual employment Lord Justice Buckley, in Hill v. Begg,[3] said: "The words are not 'who is casually employed,' but 'whose employment is of a casual nature.' I have to investigate what is the character of the man's employment, not what is the tenure of the employment. Is the employment one which is in its nature casual? To take an analogy or illustration from a different subject, say land. The question is what is the nature or quality of the land—is it, for instance, building land or agricultural land—not what estate is held in the land. Suppose that a host, when from time to time he entertains his friends at dinner, or his wife gives a reception or dance, has been in the habit for many years of employing the same men to come in and wait at his table or assist at the reception, it may be said that their employment is regular. But the employment is of a casual nature. It depends upon the whim or the hospitable instincts or the social obligations of the host whether he gives any, and how many, dinner parties or receptions, and the number of men he will want vary with the number of his guests. In such a case the waiters may not incorrectly be said to be regularly employed in an employment of a casual nature."

A window cleaner called and cleaned the windows of the house of a physician about once a month without receiving a special invitation or permission to do so on each occasion, and there was no formal contract between the parties. A portion of the house was used by the physician in connection with the practice of his profession. On one ocasion while cleaning a window of the dining room the cleaner received an injury. Held, that the employment was of a casual nature, and that the man was not employed for the purpose of the employer's trade or business.[4]

(1) Simmons v. Heath Laundry Co., 102 L. T. Rep. 210, (1910) 1 K. B. 543, 26 T. L. Rep. 326, 79 L. J. K. B. 395, 3 Butterworth's W. C. Cas. 200.

(2) Wray v. Taylor Bros. & Co., 109 L. T. Rep. 120, 6 Butterworth's W. C. Cas. 529.

(3) 99 L. T. Rep. 104, (1908) 2 K. B. 802, 24 T. L. Rep. 711, 77 L. J. K. B. 1074, 1 Butterworth's W. C. Cas. 320.

(4) Rennie v. Reid, (1908) Sc. Sess. Cas. 1051, 45 Sc. L. Rep. 814, 1 Butterworth's W. C. Cas. 324.

In his opinion rendered in this case, Lord Stormonth-Darling said: "There was no formal contract between the parties, and the respondent might have engaged other persons to clean the windows, and might have refused the appellant admittance whenever he came prepared to clean the windows. Could there be a more typical example of employment of a casual nature than this? The appellant went to the respondent's house on each occasion on the chance of being permitted to clean the windows. That chance was no doubt a good one, but it cannot possibly be said that the employment was either permanent or periodic."

A woman worked regularly without fresh instructions for an employer on every Friday and alternate Tuesdays for eighteen months. She worked at home and for others on the other days of the week. While at work at this employer's house on one of the specified days she met with an accident. It was held that the contract of service was of a periodic nature, and that the employment was not casual.[5] This case is distinguishable from that of Hill v. Beggs, *supra,* in that in the latter case there was no agreement between the parties for either permanent or periodical employment.

If a man is employed for the purposes of the employer's trade or business, it matters not that the employment is of a casual nature; the man is, nevertheless, a workman.

A laborer complained of the height of a hedge which extended between his garden and the land of a farmer; the hedge being located entirely on the land of the latter. The former agreed to give the laborer ten shillings to cut the hedge, and he, the farmer, would use the poles on his farm. While employed at this work the laborer met with an accident. Held, that while the employment was of a casual nature, it was for the purpose of the farmer's trade or business, and that the laborer was a workman while engaged in that employment.[6]

The owners of a barge employed the captain to do the work of overhauling the barge, which was done about once a year. The captain was at liberty to employ some one to help him, and he employed the mate. The mate was injured in the course of the work. The County Court Judge found that the overhauling was no part of the trade or business of the barge owners, consequently the man was not a workman, and on appeal this finding was upheld.[7] In this case it was said by the Master of the Rolls (Cozens-Hardy) who delivered the principal opinion of the court: "If we were to accept the arguments which have been put before us now on behalf of the injured man, I think we should in such a case be driven to say that the section ought to be applied to any operation reasonably incidental and necessary for the purposes of the business, although the operation itself was not part of the nature of the business undertaken. For instance, take the case of painting; there is scarcely any business at all which does not require periodical painting of the premises. The owner of the factory or mill is not a painter. Painting is not any part of his business. That is not the business which he undertakes, and I think we should be giving an enormous scope to this section if we were to hold that all those incidental operations, although reasonably incidental to the business, and the business not being capable even of being carried on without them, came within the section."

One May, a surveyor and estate agent, who had been instructed to let a dwelling house, decided to take the house himself. He was allowed a sum to pay for redecorating and repairing the house, and he contracted with one Smith to do the work under his, May's, supervision. Smith em-

(5) Dewhurst v. Mather, 99 L. T. Rep. 568, (1908) 2 K. B. 754, 24 T. L. Rep. 819, 77 L. J. K. B. 1077, 1 Butterworth's W. C. Cas. 328.

(6) Tombs v. Bomford, 106 L. T. Rep. 823.

(7) Hayes v. Thompson & Co., 6 Butterworth's W. C. Cas. 130.

ployed a man to help, who was injured in the course of the work. Held, that this was not a contract in the course of or for the purposes of May's trade or business.[8]

Members of Employer's Family Not a Workman.—A man, twenty-six years of age, was employed as an ordinary workman by his father, with whom he lived, paying board and lodging. While employed by his father on work at another town (Oban) where he lodged for the time, he received an injury, for which he applied for an award of compensation. The son maintained that being forisfamiliated he was not a member of the employer's family, and that, being absent at the time of the accident, he was not "dwelling in his house." It was held that at the time of the accident he was a "member of the employer's family dwelling in his house," and accordingly was not a "workman."[9]

"It was true," said Lord Ardell, in delivering his opinion in this case, "that at the date of the accident he had gone to Oban temporarily on a particular piece of work, but according to no ordinary meaning of language could he be said to have his dwelling in Oban, or to have been other than a sojourner there. . . . A man's dwelling-place or dwelling in ordinary language is his habitation, his place of residence, or his abode, which, when he leaves, he is considered to be on a journey, and to which he returns when his journey is finished, and in the pursuer's case the only house that answers to this description is his father's house in Glasgow."

Workman or Independent Contractor.—An independent contractor is not a workman; indeed, when a person undertakes to do work as a contractor, that fact negatives the idea that he is a workman.[10]

A man whose trade was attaching letters to windows for signs, had frequently for a year called on a firm who made and dealt in enamel letters and obtained work from them. He was under no obligation to take any particular job; was paid by the piece; and defrayed his own traveling expenses. He frequently canvassed for orders for the firm, but was paid only for the orders he procured. He was at liberty to, and frequently did, accept work from others. He was injured while engaged on a job for the firm, and compensation was applied for. The arbitrator found the man to be a workman, and on appeal it was held to be impossible to say that the arbitrator was wrong on the facts.[11]

A squad of skilled workmen were employed by a firm of shipbuilders and paid weekly according to the amount of work done. After paying the wages of helpers or unskilled workmen employed by them, the squad divided the balance among themselves. These men were bound to work during the working hours recognized in the ship yard, and were paid for overtime at a certain rate an hour. Their work was supervised generally by the foreman of the shipbuilders. The plant and material were furnished by the shipbuilders. The men were subject to printed rules and regulations for the guidance of the workmen in the employment of the shipbuilders. Held, that the members of the squad were workmen.[12]

A man was employed by timber merchants to bring his horse and drag logs from one place to another, for which he was paid by the day. His work was to lead the horse, and this he might have done by means of a substitute, it not being understood that he should perform the work personally. It was held that he was an independent contractor, and so not entitled to compensa-

(8) Brine v. May, Ellis, Grace & Co., 6 Butterworth's W. C. Cas. 134.

(9) McDougall v. McDougall, (1911) Sc. Sess. Cas. 426, 48 Sc. L. Rep. 315, 4 Butterworth's W. C. Cas. 373.

(10) Vamplew v. Parkgate Iron, Etc., Co., 88 L. T. Rep. 756, (1903) 1 K. B. 851, 19 T. L. Rep. 466, 72 L. J. K. B. 575, 51 Wkly. Rep. 691, 5 W. C. Cas. 114.

(11) Taylor v. Burnham & Co., (1910) Sc. Sess. Cas. 705, 47 Sc. L. Rep. 643, 3 Butterworth's W. C. Cas. 569.

(12) McCready v. Dunlop & Co., 2 Sc. Sess. Cas. (5th Series) 1027, 37 Sc. L. Rep. 779, 8 Sc. L. T. 91.

tion for injuries received while so engaged.[13]

Two laborers, H. and P., agreed with a quarry master to remove the surface earth from a new part of a quarry at a specified rate per cubic yard. They were joined by a third man who was to be paid one-third of what they received. The three did the work with the assistance of a man whom they engaged at fixed wages. Tools were supplied by the quarrymaster, but he exercised no control over the method of working, and the men were not required to work any given number of hours. Payments were made practically weekly, the amount being calculated on a rough estimate of the work done. H. was killed while engaged in this employment and his widow applied for compensation. Held that H. was an independent contractor and not a "workman."[14]

Workman or Co-adventurer.—The custom of sailing vessels on the sharing system is common in the West of England. By this plan the owner of a vessel will agree with a master or captain to pay certain expenses of the vessel, divide the receipts with the captain, and the latter engage a crew and pay all other expenses of sailing the vessel, over which he has absolute control for the time being. Such a contract does not create the relation of master and servant between the owner and the captain of the vessel; consequently the latter is not a workman. He is properly termed a co-adventurer.

A vessel was being sailed under an agreement whereby the owner was to receive one-third of the gross receipts and keep the vessel repaired. The captain was at liberty to take any cargoes to any place he pleased, and received two-thirds of the gross receipts, out of which he paid harbor dues, and fed and paid the crew, which he engaged. The vessel went down with all on board, and the captain's dependents made application for an award of compensation against the owner. Held, that there was no contract of service between the captain and the owner, and consequently the dependents were not entitled to compensation.[15]

The case of Jones v. Owners of "Alice & Eliza"[16] may seem to form an exception to the above stated rule, but it is not one in fact. In that case it appeared that a master of a vessel had paid the wages of the crew in a public house, and while on his return to the vessel, fell in the dock and was drowned. The widow testified that her husband was the servant of the owners, and she produced books showing that her husband received two-thirds of the gross freights, out of which he paid the ship's expenses. The other one-third of the gross freights he remitted to the owners. On these facts it was held that there was evidence to support the finding of the County Court Judge that there was a contract of service. The owners (defendants) put on no evidence, but relied on the evidence given for the applicant, namely, that the master was remunerated by the payment of two-thirds of the gross receipts. The court said that that fact was not sufficient to justify the inference that the master of the vessel was not a servant. Cozens-Hardy, M. R., said: "The widow produced the books of account showing the payments to her husband, and she said that her husband was a servant. That he was so, seems to be the presumption of law." As before mentioned, the question of whether an employe is a workman or a co-adventurer must be determined from all the circumstances of the employment. This case is submitted on its own authority and the reasoning of the court which decided it. Some stress seems to have been laid on the statement of the widow that the master was a servant, which would be the statement of a mere conclusion. However, no

(13) Chisholm v. Walker & Co., (1909) Sc. Sess. Cas. 31, 46 Sc. L. Rep. 24, 2 Butterworth's W. C. Cas. 261.

(14) Hayden v. Dick, 5 Sc. Sess. Cas. (5th series) 150, 40 Sc. L. Rep. 95, 10 Sc. L. T. 380.

(15) Boon v. Quance, 102 L. T. Rep. 443, 3 Butterworth's W. C. Cas. 106.

(16) 3 Butterworth's W. C. Cas. 495.

proof was made of the custom mentioned, and the absence of evidence for the employers was evidently the cause for such a decision.

Partner as a Workman for the Firm.—One of three partners, owners and operators of a coal mine, worked in the mine as a working foreman under an agreement with the other partners that he should receive weekly wages like an ordinary workman. While so engaged he met with an accident which caused his death, and a claim for compensation was made by his widow against the surviving partners. It was held that, as the deceased had been a partner in the firm there was not the relation of employer and employed contemplated by the statute.[17] It was said that the deceased man might come within the definition of "workman" if the definition were considered separate from the other provisions of the act, but, in view of the fact that the act contemplates the existence of the relation of employer and employed, and it being evident that the same man cannot be both employer and employed, the relation in its true sense did not exist, and the applicant must therefore fail.

To quote from the opinion of Collins, M. R., in this case: "When one analyses an arrangement between partners such as we have here, in which one partner agrees to do work for the partnership in respect of which he is to be paid what are called 'wages,' one finds that the arrangement does not really create the relation of employers and employed. Such an arrangement is in reality nothing more than a mode of adjusting the accounts between the partners. It does not alter the fundamental positon of each partner, which is that of coadventurer with each member of the partnership. A person who is a partner cannot put himself into the position of not being a partner or into the position of being a workman employed, when he is really the person giving employment."

(17) Ellis v. Ellis & Co., 92 L. T. Rep. 718, (1905) 1 K. B. 324, 21 T. L. Rep. 182, 74 L. J. K. B. 229, 7 W. C. Cas. 97.

It seems that in Scotland co-owners are not necessarily partners, the firm being a distinct entity from the persons owning interests in the same; the relation being similar to that existing between a corporation and its stockholders. Consequently where application was made for compensation for the death of one who was part owner of a vessel and was at the same time employed as master of the vessel, it was found that he was a workman whose widow was entitled to compensation. There the fact that the deceased was part owner of the vessel did not make him a partner or joint adventurer in the trading of the vessel, although he would ultimately bear part of the loss.[18]

Member of Police Force.—Where members of police forces are excepted from the definition of "workman," as they are by the English act, a police officer cannot recover compensation for any injury received in the course of his duties as such officer. A police officer was injured while assisting to extinguish a fire, which work was made a part of his duty by a statute relating to his duties as an officer. Held, that he was not entitled to compensation.[19]

Employe of Charitable Institution.—A blind pauper was injured while working in the industrial department of a charitable institution which supplied industrial instruction to blind persons. The institution was not self suportinpg, but depended partly on charity. On account of this pauper the institution received fourteen pounds eight shillings a year from his parish, and twenty pounds a year from a charitable fund. The institution supplied the pauper with board, lodging and clothing ,and paid him five shillings a month. Held, that the pauper was a workman.[20]

In the leading opinion in this case it was said: "He was employed under a contract

(18) Sharpe v. Carswell, (1910) Sc. Sess. Cas. 391, 47 Sc. L. Rep. 335, 3 Butterworth's W. C. Cas. 552.

(19) Sudell v. Blackburn Corporation, 3 Butterworth's W. C. Cas. 227.

(20) MacGillivray v. Northern Counties Institute, (1911) Sc. Sess. Cas. 897, 48 Sc. L. Rep. 811, 4 Butterworth's W. C. Cas. 429.

of service. He was not bound to go to the Institute, and the Institute was not bound to receive him. He stipulated that he would give his services for what they were worth to the Institute, and they in return stipulated that they would give him board, lodging, and clothing, and five shillings a month in money."

A man employed by a society formed for the purpose of giving work to unemployed persons, has been held to be a workman within the meaning of the English act.[21]

Physician Not a Workman.—A dispensary physician employed by the Guardians of the Poor, in Ireland, at a salary of one hundred and twenty pounds a year, was declared not to be a workman, within the English act. The court held that there was no contract of service with an employer, as required by the act.[22]

Law Writer a Workman.—One employed as a law writer has been held in England to be a workman.[23] This man was employed by a firm of law-stationers. "Law-stationers" is a term applied to tradesmen who deal in stationery and other articles required by lawyers. In Great Britain and Ireland the business includes the taking in of manuscripts and legal documents to be copied or engrossed. Persons employed to do such copying are known as law writers. This is what is meant in the given case by "law writer."

Scientist Not a Workman.—Whether or not an employe is a "workman" depends upon his contract of employment. If he is employed as a workman the fact that he has a university degree does not render him any less a workman. On the other hand if he is employed in the capacity of a scientist the fact that he performs manual labor in connection with the work for which he was employed does not make him a workman.

One who held a university degree of Master of Science was employed by the owners of a chemical and dye works under a contract which required him to obey all orders of those in authority in such work as might be allotted to hom, but the general effect of the contract was that he should exercise his scientific knowledge for the benefit of his employers' business. He rereceived an injury by accident arising out of and in the course of his employment which resulted in his death, and his widow claimed compensation. It was held that, considering the general scope of his contract, which was that his employers might get the benefit of his scientific knowledge as a skilled expert, he could not be said to be a "workman."[24]

Here, it was said by the Master of the Rolls, the object of the employers in entering into this agreement was to avail themselves of the special scientific skill of the deceased, and to bring that skill into juxtaposition with the practical work of their business, so that the deceased might be enabled to bring his scientific knowledge to bear for the benefit of the employers' business.

Professional Football Player a Workman.—A professional football player engaged himself to play football for a club for one year; to render services of the kind exclusively to that club in all matches, whenever called upon by the club to do so; to abstain from engaging in the business of a publican or in any business connected with public houses, and from residing in a public house or upon any licensed premises, during the contract period; to keep himself temperate, sober, and in good playing form, and to attend regularly to training, and observe the training and general instructions of the club, and do all that the club deemed necessary to fit himself as an

(21) Porton v. Central (Unemployed) Body, 100 L. T. Rep. 102, (1909) 1 K. B. 173, 25 T. L. Rep. 102, 78 L. J. K. B. 139, 73 J. P. 43, 2 Butterworth's W. C. Cas. 296.

(22) Murphy v. Enniscorthy Board of Guardians, 42 Ir. L. T. 246, 2 Butterworth's W. C. Cas. 291.

(23) McKrill v. Howard & Jones, 2 Butterworth's W. C. Cas. 460.

(24) Bagnall v. Levinstein, 96 L. T. Rep. 184, (1907) 1 K.B. 531, 23 T. L. Rep. 165, 76 L. J. K. B. 234, 9 W. C. Cas. 100.

efficient football player. His pay was to be three pounds ten shillings a week. If the player refused or neglected to play in club matches when so required, or refused or neglected to obey the training or general instructions of the club he was to pay to the club for each such refusal or neglect a sum not exceeding five pounds, and the club had the power of suspension for any period the directors might determine. The club was organized and conducted for profit. It was held that the contract was one for manual labor, and that whether it was or not it plainly came within the words "or otherwise" as used in the definition of the word "workman," and that the man was a workman.[25]

Cozens-Hardy, M. R., said in this case: "It has been argued before us very forcibly that there is a certain difference between an ordinary workman and a man who contracts to exhibit and employ his skill, where in the exercise of that skill the Club would have no right to dictate to him how he should play football. I am unable to follow that. He is bound according to the express terms of his contract to obey all general directions of the club, and I think in the particular game he was engaged in he would also be bound to obey the particular instructions of the captain or whoever it may be who is the delegate of the authority for the purpose of giving those instructions. In my judgment it cannot be that a man is taken out of the operation of the act simply because in doing a particular kind of work which he is employed to do, and in doing which he obeys general instructions, he also exercises his own judgment uncontrolled by anybody."

Master or Captain of Vessel as a Workman—The captain of a vessel was employed on a basis of remuneration of a per centage of the net freight. The owner instructed him where to go and what to do, and he was given no option in settling the freight, which was to be paid to the owner. On the trip the captain was injured, and on application being made for an award of compensation it was held that the captain was a workman employed under a contract of service, and between whom and the owner of the vessel the relation of master and servant existed.[26]

Teacher as a Workman.—In a case in which it appeared that the applicant was employed in a laundry, where she received an injury for which compensation was asked, and instructed pupils in music during her spare time, the applicant was held not to be a "workman" when teaching music.[27]

In this case it was said: "I am far from saying that a teacher may not be within the act, the words 'or otherwise' being sufficient to cover such a case. An usher in a private school or a teacher in a provided or non-provided school or a nursery governess, would, under ordinary circumstances, be entitled to claim the benefit of the act. On the other hand, it would, I think, be absurd to hold that a skilled music master who gives lessons to a pupil, either in his own house or in the pupil's house, is to be regarded as the 'workman' and the pupil as the 'employer.'"

Lecturer as a Workman—A man was employed as lecturer by the owner of an airship. The airship was on exhibition and it was the lecturer's duty to explain the various parts of the machine to persons who were admitted to view it, and tell of the exploits of the owner While engaged in the performance of such duties the airship exploded, and he was so severely injured that he died. Held, that he was not a workman.[28]

C. P. BERRY.

St. Louis.

(25) Walker v. Crystal Palace Football Club, 101 L. T. Rep. 645, 26 T. L. Rep. 71, (1910) 1 K. B. 87, 79 L. J. K. B. 229, 3 Butterworth's W. C. Cas. 53.

(26) Smith v. Horlock, 109 L. T. Rep. 196, 6 Butterworth's W. C. Cas. 638.

(27) Simmons v. Heath Laundry Co., 102 L. T. Rep. 210, 26 T. L. Rep. 326, (1910) 1 K. B. 210, 3 Butterworth's W. C. Cas. 200.

(28) Waites v. Franco-British Exhibition, 25 T. L. Rep. 441, 2 Butterworth's W. C. Cas. 199.

GUARDIAN AND WARD—PERSONAL PROPERTY.

ECHOLS et al. v. SPEAKE.

(Supreme Court of Alabama. Dec. 18, 1913. Rehearing Denied Feb. 5, 1914.)

64 So. 306.

A guardian of a minor having the same jurisdiction over the minor's choses in action as an executor has over the personal property of his testator, the guardian, at his peril, and the peril of his bondsmen, may assign and transfer notes belonging to the minor estate. McClellan, J., dissenting.

The case made by the bill is: That the complainant became indebted to one William C. Preston, as guardian of the estate of Harry W. Preston, a minor, in the sum of $1,500, and, to secure the payment of said indebtedness, executed a mortgage to secure five promissory notes, each in the sum of $300, bearing date August 11, 1906, and maturing, respectively, on the 1st of August, 1907, 1908, 1909, 1910 and 1911; said notes bearing interest from date and the interest being payable annually. That after the execution of the notes and mortgages, Preston, the guardian, discounted the notes falling due in 1907 and 1908, and transferred them and the mortgage to secure them to one Samuel Irwin, without the consent of complainant or without his knowledge, and it is also alleged on information and belief that Irwin transferred, before the first note matured, the said notes and mortgages transferred to him to one James L. Echols; the same being without recourse on said Irwin, and being made without the consent or instigation of complainant. That on August 20, 1907, complainant paid to Preston, as guardian of said minor, the first of said notes, and the interest on the other four notes, and declined to pay said note to Echols, believing that he had no right or title thereto. It is then alleged that Marvin West had succeeded William C. Preston as guardian of the minor Harry Preston. That Echols is threatening to proceed by foreclosure to collect the two notes, and that West, the guardian, is demanding of complainant the payment of the note, with interest thereon, and that complainant is ready, able, and willing to pay and discharge the debt as soon as it can be ascertained to whom it is payable. The notes and mortgages are made exhibits, and both Echols and West answered; each setting up their respective claims. Upon the pleadings and proof and the testimony noted, chancellor held and decreed that the sale by Preston of the note passed no interest to his transferees, and that the title to said notes and mortgages remained in the guardian, and directed the surrender and delivery of the notes and mortgages to the guardian.

O. Kyle, of Decatur, for appellants. Callahan & Harris, of Decatur, for appellee.

DE GRAFFENRIED, J. In the case of Mason v. Buchanan, 62 Ala. 110, this court, through Brickell, C. J., speaking of the authority of a guardian over the choses in action of his ward, said: "As to these, he may exercise the power which an executor or an administrator may exercise over choses in action coming into his hands for administration. A want of diligence in the exercise of the power will render him liable, but third persons, dealing with him in good faith, are not the guarantors of his prudence; they answer only for their own fair dealing." While much was said by this court in that case which was unnecessary to a determination of the question then before the court, we take it that the quoted excerpt from the opinion is but a statement of the common-law rule on the subject, and it is a familiar proposition that statutes are not to be held to abolish a well-established rule of the common-law unless it plainly appears that it was the legislative purpose to abolish the common-law rule. Cook v. Meyer, 73 Ala. 580.

In the case of Butler v. Gazzam, 81 Ala. 493, 1 South. 17, this court said: "Our past decisions sustain the rule that the executor or administrator has the full legal title to all choses in action due the estate of the decedent, and that he may, in the absence of fraud or collusion, release, compound, or discharge them as fully as if he were the absolute owner, being answerable only for any improvidence in the exercise of the power." This quoted rule was approved by this court in Logan, Adm'r. v. Central Iron & Coal Co., 139 Ala. 548, 36 South. 729, and we take it that the quoted rule clearly indicates that an administrator may sell, without an order of the court, at his peril and the peril of his bondsmen, the choses in action of the estate of his intestate. If, then, this court, in Mason v. Buchanan, supra, was correct in its statement of the law that a guardian may exercise the power which an executor or administrator may exercise over the choses in action of his intestate, then it would follow, as a necessary conclusion, that a guardian, without an order of court, may, at his peril and at the peril of his bondsmen, sell the choses in action of his

ward. Schmidt v. Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250.

In a note by Mr. Freeman to the above case of Schmidt v. Shaver, which note is to be found in 89 Am. St. Rep. 281, we find the following:

"(1) General Rule.—Except in South Carolina, the right of a guardian, in the absence of a statute, to dispose of the personal property of his ward is well settled. As is said in Wallace v. Holmes, 9 Blatchf. 65, Fed. Cas. No. 17,100: 'His duty to pay debts and to provide for the support, maintenance, and education of the ward, and generally to manage the estate, * * * all imply the power of the guardian in this respect. In this management, he is under a rigid responsibility, not only for the property, but for its management and disposal for the best interests of the ward.' It is therefore the rule, supported by the great weight of authority, that a guardian may, without application to, or an order of court, sell the personal property of his ward. Woodward v. Donally, 27 Ala. 198; Lee v. Lee, 55 Ala. 590; Mason v. Buchanan, 62 Ala. 110; McConnell v. Hodson, 7 Ill. [2 Gilman] 640; Schmidt v. Shaver (principal case) 196 Ill. 108, 63 N. E. 655 [89 Am. St. Rep. 250]; Schmidt v. McBean, 98 Ill. App. 421; Humphrey v. Buisson, 19 Minn. 221 [Gil. 182]; Field v. Schieffelin, 7 Johns. Ch. [N. Y.] 150, 11 Am. Dec. 441; Thomas v. Bennett, 56 Barb. [N. Y.] 197; Tuttle v. Heavy, 59 Barb. [N. Y.] 334; Truss v. Old, 6 Rand [Va.] 556, 18 Am. Dec. 748; Bank of Virginia v. Craig, 6 Leigh [Va.] 399; Maclay v. Equitable Life Ass'n. Soc., 152 U. S. 499, 14 Sup. Ct. 678 [38 L. Ed. 528]; Mulen v. Wine [C. C.] 26 Fed. 206; Wallace v. Holmes, 9 Blatchf. 65, Fed. Cas. No. 17,100. A guardian may therefore dispose of his ward's interest in a patent right (Wallace v. Holmes, 9 Blatchf. 65, Fed. Cas. No. 17,100), a right to locate public land as a homestead (Mullen v. Wine [C. C.] 26 Fed. 206), or a judgment in favor of his ward (Schmidt v. Shaver [principal case] 196 Ill. 108, 63 N. E. 655 [89 Am. St. Rep. 250].

"(2) Assignment of Choses in Action.—The most frequent exercise of this right is, however, in the sale and assignment of promissory notes or other choses in action, in the larger number of cases secured by mortgage. The right of the guardian to assign is in such case undoubted (McConnell v. Hodson, 7 Ill. [2 Gilman] 640; Humphrey v. Buisson, 19 Minn. 221 [Gil. 182]; Tuttle v. Heavy, 59 Barb. [N. Y.] 334; Field v. Schieffelin, 7 Johns Ch. [N. Y.] 150, 11 Am. Dec. 441; Fletcher v. Fletcher, 29 Vt. 98), especially where the choses in action are made payable to the guardian (Gentry v. Owen, 14 Ark. 396, 60 Am. Dec. 549; Fountain v. Anderson, 33 Ga. 372; Jenkins v. Sherman, 77 Miss. 884, 28 South. 726; Gillespie v. Crawford [Tex. Civ. App.] 42 S. W. 621) or if shares of stock stand in his name (Atkinson v. Atkinson, 8 Allen [Mass.] 15; Bank of Virginia v. Craig, 6 Leigh [Va.] 399)."

It will be noticed that in the above note the case of Mason v. Buchanan is cited by the learned annotator as sustaining the position assumed by him, and we think that, certainly in so far as the sale of choses in action is concerned, the case sustains the conclusions of the annotator.

It would seem, therefore, that in this state a guardian may sell the choses in action of his ward at his peril and at the peril of his bondsmen without an order of court.

The decree of the chancellor is not in accordance with the above views, and the decree is therefore reversed, and a decree is here rendered granting to appellant the relief prayed for in his cross-bill.

Reversed and rendered.

DOWDELL, C. J., and ANDERSON, MAYFIELD, SAYRE, and SOMERVILLE, JJ., concur. McCLELLAN, J., dissents.

NOTE.—*Right of Guardian to Transfer Notes Payable to Him as Such.*—The instant case has back of it the great weight of authority, but there seems some little authority the other way. The common law rule is decided to be as stated, but there may be limitation in statutes, the general theory being that as to guardian's management of personal property he is presumptively acting for the benefit of the ward. However, we cite three cases which seem opposed to the instant case.

Among the cases cited to sustain the ruling in the principal case is Gillespie v. Crawford, Tex. Civ. App. 42 S. W. 621, when as a matter of fact it seems directly opposed thereto. Thus the case concerned a suit by wards against the foreclosure of promissory notes from a guardian and it was said: "It is clear, under our laws, that a guardian has no power to sell personal property generally, in the absence of an order of the probate court directing him to make such sale. But it is contended that our statutes make a distinction between notes due the estate of the ward, and personal property, and have the effect of taking such notes out of the category of personal property belonging to the estate." But this contention was not admitted. It was said that the purchaser knew that the notes constituted a trust fund and there was cited 1 Daniel Neg. Inst. § 271, to the following effect: "If a guardian take a note payable to his order as guardian for the property of his ward and indorse it to a bona fide party for value, it has been held that it is a good transfer, the words 'as guardian,' etc., being mere *descriptio personae*. But the better opinion seems to be that while, if the fiduciary, indicated as payee, may transfer a good title, provided he makes the transfer within the

authority of, and for the benefit of, his trust, yet that such words as 'trustee,' etc., suffixed to a payee's name, put his indorsee upon inquiry as to the title, and, if the transfer be in fraud of the trust, the indorsee must suffer the consequence."

In Strong v. Strauss, 40 Ohio St. 87, it was held that where a guardian sold real estate of his wards and took notes of the purchaser payable to himself as guardian, and secured them upon the real estate, and afterwards sold the notes through a broker to a third party and failed to account to his ward for the proceeds of the notes, the purchaser of the notes could be held liable to the wards for their value. The statutes of Ohio authorized a guardian to sell his ward's personal estate only "when for the interest of the ward." This was held to put the purchaser on inquiry, and he could have demanded that the guardian procure from the probate court an order of sale.

In Louisiana the general rule is that a tutor must upon advice in a family meeting approve transfer of a note, but if the indorser shows a transfer was made in the interest of a minor, the title remains in the transferee. Woodbridge v. Pope, 22 La. Ann. 293. C.

ITEMS OF PROFESSIONAL INTEREST.

WORKMEN'S COMPENSATION IN THE UNITED STATES AND FOREIGN COUNTRIES.

The rapidity with which compensation laws are superseding employers' liability laws as a method of dealing with the results of industrial accidents is clearly indicated in Bulletin No. 126 of the United States Bureau of Labor Statistics entitled "Workmen's Compensation Laws of the United States and Foreign Countries."

This bulletin recounts the activities of the 28 commissions appointed in this country to consider the subject, in so far as reports were made, and reproduce the text of the laws of the 23 states which have enacted such legislation, besides the Federal statute, the Executive Order relative to the Canal Zone, and the Railway Employees' Bill that was before the Sixty-second Congress. Accounts of the operations of the laws and of their construction by the courts are also given.

The laws of their respective states have been declared constitutional by the courts of last resort in Massachusetts, New Jersey, Ohio, Washington, and Wisconsin, though in Montana and New York the opposite result was reached; in Montana because of the presence of an unessential feature of the law that permitted double liability, while in New York the principle of the law was held to be in conflict with the constitution of the state. The constitution was amended last year and a law enacted in conformity with this expression of the will of the people on this subject.

Carefully worked out charts and analyses offer facilities for a comparative study of the laws of the different states, while similar analyses of the laws of 41 foreign countries permit this comparison to be extended to an international scope.

Tables are given showing the duration of compensation payments for specified injuries and the corresponding percentage of disability, as provided by the state laws, and a comparison with foreign countries is here also possible, as the ratings of a number of European authorities are reproduced in this connection.

A number of states provide for insurance in state funds or funds under state control, and an interesting presentation is made of the premium rates provided under certain state systems and the company rates in states in which the state makes no such provision.

Foreign legislation is much more briefly considered, but interesting data are given with reference to the more important features of the laws, besides the analyses already mentioned. This matter, like that relating to the United States, is believed to be complete up to the end of the year 1913.

In the present state of interest in the subject of workmen's compensation, this bulletin offers material of great value, containing as it does a complete presentation of the subject from all points of view, including that of the investigator, the courts, administrative officials and the actual results to beneficiaries under the Federal and several state laws. A number of legislatures and commissions are considering the subject at the present time, and Congress has before it bills relating to railroads and to the civilian employees of the United States, the latter as an amendment to the present very inadequate law.

It is worthy of note that no country has ever returned to the liability system after having enacted a compensation law; and while some desire is expressed in certain quarters to delay action until a uniform measure can be agreed upon, it is apparent to the most casual observer that the rapid movement of the past five years is likely to continue its progress until the rule of proved negligence of the employer and the assumption by the employee of all risks not arising therefrom is superseded by the more humane and equitable doctrine of making the industry provide for the human no less than the mechanical breakage and wear and tear. A. H. P.

BOOKS RECEIVED

Philosophy As a Science. A synopsis of the writings of Dr. Paul Carus. Containing an introduction written by himself, summaries of his books, and a list of articles to date. Chicago. The Open Court Publishing Company. London Agents: Kegan Paul, Trubner, Trench & Co., Ltd. 1909.

American Annotated Cases. Volume 1914 A. Containing the Cases of General Value and Authority Subsequent to Those Contained in American Decisions, American Reports and the American State Reports. Thoroughly Annotated, with Index to the Notes in Volumes 1913-C to 1914-A. Price, $5.00. Bancroft-Whitney Company, San Francisco. Edward Thompson Co. Northport, L. I., N. Y., Review in this issue.

The Blue Book of Evidence. Volumes 4 and 5. Commentaries on the Law of Evidence in Civil Cases. By Burr W. Jones of the Wisconsin Bar. Professor of the Law of Evidence in the College of Law of the University of Wisconsin. With the law applicable to each section of the original text, rewritten, enlarged and brought with authorities up to the present date by L. Horwitz of the San Francisco Bar. Price, De Luxe edition, $37.50; Library edition, $33.00; for the complete set of 5 volumes. San Francisco. Bancroft-Whitney Company. 1914.

BOOK REVIEWS.

AMERICAN ANNOTATED CASES, 1913E AND 1914A.

This excellent series continues in its career, the two volumes on our table seeming especially excellent in their large and judicious annotation of the select cases they contain. These cases come from every state in the union, from the federal courts and from Canada and England.

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The volumes come from the well-known law book house of Bancroft-Whitney Co. San Francisco, and Edward Thompson Co., Northport, L. I., N. Y., 1914.

GOLDMAN'S HANDBOOK OF STOCK EXCHANGE LAWS.

"A Handbook of Stock Exchange Laws Affecting the Members and Their Customers, Brokers and Investors," by Samuel P. Goldman, of the New York Bar, is what it purports to be, not a treatise for lawyers, but serviceable alike to them and to stock brokers and their customers, with special reference to the New York Stock Exchange. While not so pretentious a work as Don Passos on Stock-Brokers and Stock Exchanges, its notes on decisions of the courts of the country relative to the Constitution, By-Laws and Rules of Exchange are copious and clearly illustrate the text. "Of necessity," says the author, "the rules are strictly enforced. Sales and purchases are made and contracts undertaken involving thousands of dollars, without any written memoranda, a nod of the head or a wave of the hand being all that is used to bind the bargain. The infractions of the rules are very few, so few in fact that it may fairly be said that no more honorable body of men exists anywhere in the world."

The book is a neat cloth-bound octavo of 290 pages, including an excellent index, and is published by Doubleday, Page & Co.

HUMOR OF THE LAW.

The divorce lawyer beamed on a supposed lady client as he asked her to be seated.

She: "Is infidelity a good ground for divorce, Mr. Lawyer?"

He: "It is one of the chief grounds, madam. Is it your husband who is the guilty party?"

She: "Yes, sir."

He: "Have you witnesses to prove it?"

She: "Yes, I can prove it by a hundred witnesses as respectable as any in this city."

He: "Have you talked with them?"

She: "No, I have not, but they know he hasn't been to church in five years."

A Representative in Congress from a northwestern state tells of a youthful lawyer who had been retained to defend an old offender on the charge of burglary. The rules of the court allowed each side one hour in which to address the jury.

Just before his turn came the young lawyer consulted a veteran of the bar who was in the court room. "How much time," he asked, "do you think I should take in addressing the jury?"

"You ought to take the full hour."

"The full hour! Why, I thought I should take something like ten minutes!"

"You ought to take the full hour."

"Why?"

"Because the longer you talk, the longer you will keep your client out of jail."

There was tried in Pennsylvania a case wherein the chief witness was a miner. To him was put the question:

"Were you ever hurt in the mines?"

"Indade I was," responded witness, "I was half kilt once."

"Now," continued the examiner, "state to the court whether you were injured at any other time."

"Well, I was half kilt in another accident a short time after that."

Whereupon counsel for the other side smilingly interjected: 'I object to this man's testimony."

"Upon what ground?"

"On the ground that having been half killed twice he is a dead man, and therefore incompetent as a witness."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Bailment**—Contract.—Where the owner of cattle delivered them to another to keep for a term of years, the increase to be divided, the original herd returned, and a certain shrinkage to be borne by the owner and any loss above that to be borne in fixed proportions, and the owner to pay the taxes, held to create a bailment.—Simmons v. Shaft, Kan., 138 Pac. 614.

2.——Gratuitous Bailee.—Where plaintiff's horse was killed at a railroad crossing as he was being ridden by plaintiff's servant, who was employed by the day, to the home of such servant at the end of his day's work, the servant was a gratuitous bailee of the horse and not plaintiff's servant at the time.—Spelman v. Delano, Mo., 163 S. W. 300.

3.——Negligence.—Where a bailment is for mutual benefit, the bailee is responsible only for ordinary negligence, and not, in absence of special stipulation, for injury to it by some internal decay, accident, or means wholly without his fault.—Williamson v. Phillipoff, Fla., 64 So. 269.

4. **Bankruptcy**—Discretion of Court.—Whether a receiver should be appointed for a bankrupt, whether, if appointed, he should continue the bankrupt's business, whether he shall retain counsel, and the amount to be allowed to the receiver for his fees and for the services of counsel, are matters within the sound discretion of the district court.—In re Cash-Papworth, Grow-Sir, C. C. A., 210 Fed. 24.

5.——Discretion of Court.—On a petition to revise an order making certain allowances to a bankrupt's receiver and his counsel, the record merely showing receipts and disbursements and that nearly half the assets were used for expenses of administration, held insufficient to show an abuse of the trial court's discretion.—In re Cash-Papworth, Grow-Sir, C. C. A., 210 Fed. 24.

6.——Exemptions.—Despite Bankruptcy Act, § 6, relating to exemptions, a conveyance by a bankrupt of nonexempt property, in consideration of his grantee's promise to discharge an incumbrance on the bankrupt's homestead, is voidable as a preference where not assented to by the holder of the incumbrance.—Lacy v. Chandler, Tex., 163 S. W. 328.

7.——Insolvency.—The adjudication of bankruptcy is a determination of insolvency and the existence of creditors, not necessarily creditors antecedent to a conveyance, but at least subsequent thereto.—Cartwright v. West, Ala., 64 So. 293.

8.——Partnership.—Property of a partnership contributed by its members to the capital of another partnership of which they became members held to have passed to the new partnership and to be subject to its debts in bankruptcy as aganist the trustee of the former owner and its members.—Warner v. Grafton Woodworking Co., C. C. A., 210 Fed. 12.

9. **Banks and Banking**—Clearing House.—The payee of a check, who deposited it for collection, would not be bound by a presentation for payment through a clearing house of which the depositor was not a member, but of which the drawee bank and the collecting house were members, where the clearing house rules permitted presentation after the time within which the law required the check to be presented; and hence the collecting bank would be liable to the payee, where, when presented pursuant to the clearing house rules, the drawee had become bankrupt.—Dorchester v. Merchants' Nat. Bank of Houston, Tex., 163 S. W. 5.

10.——Collection.—Where a check or other negotiable paper is deposited with a bank for collection, the relation of principal and agent is created.—Security Savings & Trust Co. v. King, Ore., 138 Pac. 465.

11. **Bills and Notes**—Consideration.—Where the payee of notes given on his paying the maker's debt to a third person purchased the judgment for such debt for 50 cents on the dollar, and took an assignment of and released the judgment, he could recover the full amount of the notes.—Wiley v. Martin, W. Va., 80 S. E. 879.

12.——Consideration.—Where defendant verbally agreed to protect plaintiff from liability on note which he indorsed for a corporation of which they were stockholders, and thereafter certain stockholders agreed to pay a judgment on the note, defendant given a check for his share, payment on which he stopped after plaintiff had paid the judgment, the check was not unenforceable for want of consideration.—Nelson v. Diffenderffer, Mo., 163 S. W. 271.

13.——Holder in Due Course.—Where a note originally matured May 15, 1907, but the due date had been changed to May 15, 1908, and plaintiff acquired it by endorsement November 2, 1907, he was not a holder in due course and hence it was subject in his hands to the defense of want of consideration.—Pensacola State Bank v. Melton, U. S. D. C., 210 Fed. 57.

14.—Interest.—Where a note for five years, specifying no time for payment of interest, was secured by mortgage conditioned for interest payable annually according to the "tenor and effect" of the note, interest held payable annually.—Johns v. Rice, Iowa, 145 N. W. 290.

15. **Breach of Marriage Promise**—Damages.—Suffering accompanying birth of a child resulting from the seduction may be considered

in determining the damages.—Booren v. McWilliams, N. D., 145 N. W. 410.

16. **Bridges**—Counties.—Where a bridge is built on the road between two counties, each county is liable for injuries from its failure to use reasonable diligence to keep the bridge in a reasonable safe condition for the traveling public.—Bethel v. Pawnee County, Neb., 145 N. W. 363.

17. **Cancellation of Instruments**—Cross-bill.—Where complainant was denied relief on his bill to cancel certain conveyances, defendants who filed cross-bills setting up merely defensive matter, no independent equity being shown, was entitled to no affirmative relief.—Sellers v. Knight, Ala., 64 So. 329.

18. **Carriers of Goods**—Measure of Damages.—In an action for the value of trees injured by delay in shipment, where the only evidence of value was the price at which they had been sold, this, in the absence of evidence to the contrary, was sufficient to esablish their market value.—Yazoo & M. V. R. Co. v. Peeples, Miss., 64 So. 262.

19.——Parties.—The real parties in interest may recover in their own right for loss or damage to a shipment of live stock, though the contract of shipment was made in the name of another.—Gulf, C. & S. F. Ry. Co. v. Drahn, Tex., 163 S. W. 330.

20. **Carrier of Passengers**—Mental Suffering.—Where a railroad company agreed with a father to wire a ticket to his son, but failed to do so, the father held entitled to recover compensation for mental suffering caused by the son's delay in reaching home.—Missouri, K. & T. Ry. Co. of Texas v. Stogner, Tex., 163 S. W. 319.

21. **Charities**—Cy Pres.—Where testator bequeathed $14,000 to the rector, wardens and vestrymen of an Episcopal church to construct a church at a specified place, but when the fund became available the place would not support such a church, such fact did not result in a failure of the charity, but it would be carried out as nearly as might be under the cy pres doctrine.—Rector, etc., of St. James Church v. Wilson, N. J. 89 Atl. 519.

22. **Chattel Mortgages** — Estoppel.—Statement of chattel mortgagee to purchaser from mortgagor as to payment that he need not worry about it, as the mortgagor was good, held not to estop the mortgagee to enforce its mortgage.—Advance Thresher Co. v. Fishback, Ky., 163 S. W. 228.

23.——Priority.—A landlord whose lease reserved to him a lien held not entitled to priority as against defendants who had extended credit to the tenant before the lease was recorded, even though defendants' chattel mortgage was not recorded until, after the lease.—Hardin v. Bank of Centralia, Mo., 163 S. W. 306.

24. **Commerce**—White Slave Act.—Transportation of women from one state to another for immoral purposes being interstate commerce, and Congress having acted by the passage of Mann Act, as the state had no jurisdiction to pass laws relating to the same subject.—State v. Harper, Mont., 138 Pac. 495.

25. **Contracts**—Architect.—An architect is bound to furnish plans and specifications prepared with reasonable skill, and which would produce, if followed, a building of the kind called for, without marked defects.—Trunk & Gordon v. Clark, Iowa, 145 N. W. 277.

26.——Comity.—There being nothing inherently bad about an oral contract, unenforceable in this state because of the amount involved, if it is valid by the laws of the state in which made, it should be enforced.—D. Canale & Co. v. Pauly & Pauly Cheese Co., Wis., 145 N. W. 372.

27.——Consideration.—The consideration for a promise is sufficient, if it is a detriment or inconvenience to the promisee or he changes his relations or relinquishes his supposed right against the promisor or a third person in consequence of such promise.—Nelson v. Diffenderffer, Mo., 163 S. W. 271.

28.——Drunkenness.—Drunkenness does not create such legal incapacity as will render a contract wholly void, and, though the party who was intoxicated at the time of the making of the contract may rescind on that ground, the contract is only voidable, and may be affirmed.—Sellers v. Knight, Ala., 64 So. 329.

29.——Estoppel.—In an action for damages for defendant's breach of its contract to sink an oil well, defendant could not be heard to say that plaintiff would have derived no benefit from a completion of its contract.—Henry Oil Co. v. Head, Tex., 163 S. W. 311.

30.——Intention.—In determining the intent of parties to a contract, their mental attitude will not control; but their spoken words and actions govern.—Woburn Nat. Bank v. Woods, N. H., 89 Atl. 491.

31.——Preventing Performance.—A party who has prevented the performance of a condition of a contract cannot take advantage of the nonperformance, or escape liabiliy on account thereof.—National Supply Co. v. United Kansas Portland Cement Co., Kan., 138 Pac. 599.

32. **Corporations**—Accommodation Paper.—It is not within the real or apparent scope of the authority of the officers or of an agent of a corporation to bind the corporation by he execution of accommodation papers.—American Bonding Co. of Baltimore, Md., v. Laigle Stave & Lumber Co., Ark., 163 S. W. 167.

33.——Partnership.—A corporation of the same name as a partnership transacting the same business before incorporation is not liable for a debt of the firm, unless there was a writing signed by the corporation or its agent, or the corporation received the condideration for the debt.—Bludwine Bottling Co. v. Crown Cork & Seal Co., Ga., 80 S. E. 853.

34.——Promissory Note.—One who lends money to a corporation on the note of a person authorized to execute same may recover on the note, though he has not followed the fund to see that the corporation actually received it.—Oklahoma Asphalt Paint & Roofing Co. v. Phillips, Ga., 80 S. E. 863.

35. **Courts**—Clerical Error.—Where a cause originating in the state court is taken from the Court of Appeals by writ of error to the federal Supreme Court, that tribunal will not correct a clerical error in the transcript; and, the trial court having lost jurisdiction, the error must be corrected by the Court of Appeals and certified to the Supreme Court.—Louisville & N. R. Co. v. Woodford, Ky., 163 S. W. 238.

36.——Jurisdiction.—The courts of the forum are without jurisdiction to set aside a deed of a deceased person to land located in a foreign country.—Holt v. Guerguin, Tex., 163 S. W. 10.

37.——Penal Statutes.—Where the controlling purpose of a statute is to impose a punishment for violating its provisions, it will not be enforced in a foreign jurisdiction.—Hill v. Boston & M. R. R., N. H., 89 Atl. 482.

38.——Stare Decisis.—While it is important that the decisions of the courts on constitutional questions should be uniform, harmonious, and consistent, yet, where no rights of private individuals will be affected, the principle of stare decisis cannot be invoked to sustain an erroneous constitutional decision.—State v. Jones, Miss., 64 So. 241.

39. **Covenants**—Attorney Fees.—A vendee who, after unavailing notice to his vendor, unsuccessfully defends the warranted title may recover the reasonable amount of his attorney's fees for making the defense.—Ellis v. Abbott, Ore., 138 Pac. 488.

40. **Criminal Evidence**—Bill of Exceptions.—Exhibits attached to the bill of exceptions, though following, instead of preceding, the judge's certificate, are to be considered as a part of the bill; they being referred to in the transcript of the evidence preceding the certificate, and the first paragraph of the bill declaring them to be made a part of the bill.—Hyde v. State, Wyo., 138 Pac. 550.

41.——Res Gestae.—Acts or declarations, to be admissible under the principle of res gestae, must be substantially contemporaneous with the main fact under consideration, and so closely connected with it as to illustrate its character.—Dudley v. State, Ala., 64 So. 309.

42. **Customs and Usages**—Latent Ambiguity.—When the usage of a locality in which an instrument is executed has given certain words therein a peculiar significance, the parties to the instrument will be presumed to have used the words in their peculiar local sense.—W. T. Smith Lumber Co. v. Jernigan, Ala., 64 So. 300.

43. **Death**—Revival of Petition.—Where plaintiff dies from injuries for which he brought suit, the action may be revived by his administrator for the benefit of his estate.—Murray v. Omaha Transfer Co., Neb., 145 N. W. 360.

44. **Dedication**—Plats.—Where a tract is platted into blocks divided by streets, and the territory is thereafter taken into the city, the ways shown on the plats become public streets.—Creekmore v. Central Const. Co., Ky., 163 S. W. 194.

45. **Deeds**—Cancellation.—A conveyance cannot be canceled because the consideration for the conveyance had not been paid.—Sellers v. Knight, Ala., 64 So. 329.

46. **Disorderly House**—Nuisance.—A house to which people promiscuously resort for purposes injurious to the public morals or health or convenience or safety is a nuisance, and the keeper is liable to indictment for keeping a disorderly house.—State v. Schlosser, N. J., 89 Atl. 522.

47. **Divorce**—Custody of Children.—It is not an essential part of a divorce decree that the court dispose of the custody of children.—Arndt v. Arndt, Mo., 163 S. W. 282.

48.——Public Interest.—Divorce is a creature of statutory enactment, and there are three parties—the plaintiff, the defendant, and the public.—Robertson v. Robertson, Mo., 163 S. W. 266.

49. **Dower**—Assumption of Mortgage.—Where a husband purchased certain real property, assuming a mortgage, his widow was entitled to have her one-third, including the homestead, set off to her free from the mortgage, if the remainder of the property was sufficient to pay the same.—Haynes v. Rolstin, Iowa, 145 N. W. 336.

50. **Ejectment** — Prior Possession.—Plaintiff in ejectment, who does not show title either by deed or adverse possession, and who has never been in possession, can recover only by showing prior possession in some one of his grantors.—Hicks v. Burgess, Ala., 64 So. 290.

51. **Equity**—Estoppel.—To constitute an equitable estoppel there must exist a false representation or concealment of material facts made without knowledge of the facts to a party who is without knowledge, or the means of knowledge, thereof, with the intent that it shall be acted upon, and which is relied or acted upon by such party to his prejudice.—Advance Thresher Co. v. Fishback, Ky., 163 S. W. 228.

52.——Pari Delicto.—Both parties to a transaction may be in fault, without being in pari delicto so as to prevent one of them from obtaining equitable relief.—Vermont Accident Ins. Co. v. Fletcher, Vt., 89 Atl. 480.

53. **Estoppel**—Sham Mortgage.—An insurance company, which, through its president, procured defendants to execute a sham mortgage for exhibition to the State Insurance Commissioners to lead them to believe that unsecured notes held by it were secured by the mortgage, cannot claim that defendants are estopped to deny the validity of the mortgage because of having executed it for such purpose.—Vermont Accident Ins. Co. v. Fetcher, Vt., 89 Atl. 480.

54. **Fraud**—Sole Reliance.—In an action for damages for false representations made in an exchange of lands, it is no defense that the representations of one of the defendants were not the sole reliance of the plaintiffs.—Skeels v. Porter, Iowa, 145 N. W. 332.

55. **Fraudulent Conveyances** — Intent.—Whether a chattel mortgage was fraudulent as to creditors is a question for the jury, unless the fraudulent intent is apparent on the face of the instrument, or is admitted, or unless some interest, inconsistent with the conveyance, has been reserved.—Panell v. First Nat. Bank, Tex., 163 S. W. 340.

56. **Frauds, Statute of**—Performance.—Though a contract of sale of goods was within the statute of frauds, yet plaintiff, having delivered the goods, cannot disregard the price fixed, and sue for their reasonable value.—Coleman v. Forrester, Mo., 163 S. W. 263.

57.——Ratification.—A principal's subsequent ratification of the contract of his agent for the sale of land must, under the statute of frauds, be in writing.—Llewellyn v. Sunnyside Coal Co., Pa., 89 Atl. 575.

58. **Garnishment**—Bankruptcy.—Where garnishment proceedings were invalid, and the garnishee lawfully paid the money owing by him to the defendant into the bankruptcy court to the credit of the defendant's estate, that the garnishment proceedings were subsequently perfected by amendment did not render him liable to plaintiff.—Joiner v. Dougherty-Ward-Little Co., Ga., 80 S. E. 854.

59. **Gifts**—Causa Mortis.—A gift causa mortis must be completely executed, go into immediate effect, and be accompanied by complete delivery.—Baber v. Caples, Ore., 138 Pac. 472.

60.——Check.—A gift of a check is not complete until the check is paid and, if without consideration, it may be revoked at any time before actual payment.—Nelson v. Diffenderffer, Mo., 163 S. W. 271.

61. **Good Will**—Individual Partners.—Contract selling business of partnership, and providing that it should not engage in the same business, held not to bind the individual partners not to so engage in such business.—Rapalee v. John Malmquist & Son, Iowa, 145 N. W. 279.

62. **Guardian and Ward**—Personal Property.—A guardian of a minor has power to assign and transfer notes belonging to the minor's estate, acting at the guardian's peril and the peril of his bondsmen.—Echols v. Speake, Ala., 64 So. 306.

63. **Homicide**—Apparent Danger.—Where defendant was justified in firing the first shot, he was justified in continuing to shoot as long as he believed his life was in danger, and if he continued to shoot after it was apparent that all danger had passed, but under the influence of the passion aroused by the difficulty, he would be guilty of no higher offense than manslaughter.—Mason v. State, Tex., 163 S. W. 66.

64.——Dying Declarations.—Statement of one made soon after being shot in the stomach, as to the circumstances thereof, she then stating that she could not get over it, and was bound to die, is admissible as her dying declaration, though she lived 11 days thereafter, and in that time made a contradictory statement.—Walker v. State, Ala., 64 So. 351.

65.——Evidence.—Declarations made by defendant, after being shot at and while he was procuring the gun with which he killed deceased, held properly admitted.—Dudley v. State, Ala., 64 So. 309.

66.——Involuntary Manslaughter.—Where defendant killed deceased with a small stick about two feet long, a verdict of involuntary manslaughter will be sustained on the ground that the jury were justified in finding the stick not to be a "means calculated to produce death," under Kirby's Dig. § 1779.—Edwards v. State, Ark., 163 S. W. 155.

67.——Perpetration of Felony.—Where a murder is committed in the perpetration of a robbery by two persons acting in concert, both are guilty of the murder, though the killing be the act of one only.—Commonwealth v. De Leo, Pa., 89 Atl. 584.

68. **Homestead**—Widow.—A widow's petition for allotment of homestead need not allege that she, as well as her deceased husband, was a resident of the state at the time of his death; the one who would deny such residence having the burden of pleading as well as of proof.—Griffin v. Griffin, Ala., 64 So. 350.

69. **Husband and Wife**—Creditors.—Where a husband and wife jointly purchased property, and the wife paid for improvements thereon, a creditor of the husband, who did not extend credit upon the faith of his ownership, can only subject the husband's interest to his debt.—Deacon v. Alsheimer, N. J., 89 Atl. 512.

70. **Insurance**—Authority of Agent.—An insurance agent, with authority to solicit insurance, accept risks, and settle the terms of insurance contracts, etc., may make a preliminary parol contract either to issue a policy or renew one about to expire.—Gresham v. Norwich Union Fire Ins. Society, Ky., 163 S. W. 214.

71.——Fraternal Society.—Where a fraternal insurance association refused to pay a loss under a certificate on the ground that the certificate had been forfeited and that there had been a failure to make proofs of loss, the pleading of the invalidity of the certificate constituted a waiver of the necessity of furnishing proofs of loss.—Walker v. Supreme Knights of Maccabees, Mo., 163 S. W. 274.

72.——Waiver.—Where the insurer, with full knowledge of the accident, demanded additional proofs, it waived its right to object that notice of accident had not been given it, as required by the policy.—Douville v. Pacific Coast Casualty Co., Idaho, 138 Pac. 506.

73. **Joint Adventures**—Interest.—A bank having agreed to finance a cotton purchase by a broker and having advanced money on bills of lading representing the cotton, and having drawn drafts on the buyers and credited all the profit to the broker, he and the bank were not joint adventurers, and he had no interest in the cotton which could be made the subject of attachment in a suit against him.—McLean v. City State Bank of Mangum, Okla., C. C. A., 210 Fed. 21.

74. **Logs and Logging**—Fruit Trees.—The word timber has a well-defined meaning and includes such trees as are suitable for building and allied purposes, but does not include fruit trees.—W. T. Smith Lumber Co. v. Jernigan, Ala., 64 So. 300.

75. **Parties**—Descripto Personae.—While the declaration should allege whether an action is brought in a representative or individual capacity, and the mere addition of the words "executor," "trustee," etc., to plaintiff's name are merely descriptive, it is sufficient if the writ and declaration, taken as a whole, show that plaintiff sues in a representative capacity though it is not expressly so alleged.—Trask v. Karrick, Vt., 89 Atl. 472.

76. **Partition**—Adverse Possession.—A parol partition of land, followed by adverse possession of the shares by the respective parties for 15 years, is conclusive of the right of each to the portion received by him in the division.—Conley v. Mayo, Ky., 163 S. W. 243.

77. **Partnership**—Bailment.—Where the owner of cattle delivered to another to keep for a term of years, the increase to be divided, the original herd returned, and a cerain shrinkage to be borne by the owner and any loss above that to be borne in fixed proportions, and the owner to pay the taxes, held to create a bailment and not a partnership.—Simmons v. Shaft, Kan., 138 Pac. 614.

78.——Majority.—On a diversity of opinion as to the internal affairs of a firm, a partnership act by a majority in good faith and within the scope of the partnership business binds the firm.—Reirden v. Stephenson, Wright & Valley, Vt., 89 Atl. 465.

79. **Principal and Surety**—Counterclaim.—Where defendants signed the note of a third person as surety, and delivered it to the payee under an agreement that the payee should secure the signature of another surety, the payee's failure to obtain the additional surety will not impair defendant's obligation, but will give them a counterclaim for damages.—Rohrman v. Bonser, Ky., 163 S. W. 193.

80. **Sales**—Delivery.—The rule that delivery of freight to a common carrier is delivery to the consignee may be varied by an agreement.—McCook v. Halliburton-Myers Co., Ga., 80 S. E. 863.

81.——Fraud—Where an agent in soliciting an order misrepresented the contents of a contract, and by trick and artifice induced the buyer to sign without reading, the buyer could rescind.—Pictoral Review Co. v. Gerald Fitzgibbon & Son, Iowa, 145 N. W. 315.

82.——Implied Warranty.—Express warranties descriptive of the particular articles sold do not exclude an implied warranty that the articles are merchantable, and so free from inherent defects as not to be worthless or unsuited for their ordinary uses.—O'Brien v. Ellarbee, Ga., 80 S. E. 864.

83.——Implied Warranty.—Where the seller represents that a machine will accomplish a certain purpose and the buyer relies thereon and has no opportunity to inspect such representation constitutes an implied warranty that the machine will accomplish the purpose represented.—S. F. Bowser & Co. v. Bathurst, Kan., 138 Pac. 585.

84.——Reservation of Title.—One purchasing under a conditional contract of sale has an interest which he may sell subject to the reservation of title in favor of the first seller.—Fox v. Delaney, Ark., 163 S. W. 157.

85. **Treaties**—Rights of Aliens.—Treaty rights of nonresident aliens must be enforced by state courts without regard to statutory provisions.—Erickson v. Carlson, Neb., 145 N. W. 352.

86. **Trespass**—Void Decree.—Where defendants entered upon plaintiff's land and attempted to construct a ditch under a void decree, they were trespassers; the decree giving them no protection.—Haines v. Fearnley, Colo., 138 Pac. 541.

87. **Trover and Conversion**—Change of Form.—Mere change in the form of things, so long as their identity can be traced, will not work a change of ownership, and trover may be maintained for their conversion or detention if they are removed from the freehold.—Pearce v. Aldrich Mining Co., Ala., 64 So. 321.

88. **Trusts**—Evidence.—While the mere breach of a parol promise relating to land does not avoid the application of the statute of frauds, and affords no basis for the invocation of equitable relief, the fact of such breach may be looked to in determining whether fraud exists which raises a constructive trust.—Butler v. Watrous, Ala., 64 So. 346.

89. **Vendor and Purchaser**—Forfeiture.—One who agreed to purchase land and paid a certain sum down on the purchase price, by failure to pay the remainder at the stipulated time, forfeited his right to recover any part of the amount paid to the vendor.—Scott v. Lewis, Mo., 163 S. W. 265.

90.——More or Less.—The words "more or less" as used in the description in a contract of sale of land are not applied to relieve against a gross deficiency in the quantity of land where the vendor's agent has assured the purchaser that he knows the lands, and that they contain in the aggregate the number of acres specifically mentioned.—Phifer v. Steenburg, Fla., 64 So. 265.

91.——Rescission.—Where vendor has contracted to convey real estate free from incumbrances, and the coal under the land has been sold, the vendee can recover back money paid on execution of the contract.—Rayman v. Klare, Pa., 89 Atl. 591.

92.——Rescission in Part.—While as a rule one may not affirm a contract for the sale of land in part and rescind in part, the rule does not operate if it would be inequitable for it to do so, and a purchaser may affirm in part and rescind in part, and obtain a proportionate rebate in the purchase price, if that is necessary to do equity.—Mills v. Morris, Wis., 146 N. W. 369.

93.——Taxes.—Where a contract for the conveyance of land required the vendor to convey good title free from all taxes except taxes not now due and payable, the vendor was bound to discharge only those taxes which had accrued and could not be compelled to discharge taxes which, while a lien upon the property, could not at that time be enforced.—Swanson v. Spencer, Mo., 163 S. W. 285.

94.——Time of Essence.—Where a contract for the sale of land provided that the second payment should be made "about" January 1, 1912, when the vendor should execute a deed, time was not of the essence of the contract, but the vendor had a reasonable time after such payment within which to perfect title and convey.—Allen v. Jenkins, Ky., 163 S. W. 234.